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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Applicant(s): Andersen et al. )  
Serial No.: 09/872,623 )  
Filed: June 2, 2001 )  
For: ALPHA-FETOPROTEIN PEPTIDES )  
AND USES THEREOF )

Examiner: Brumbach  
Art Unit: ~~1642~~ 1642

PETITION UNDER 37 C.F.R. §1.182 OR §1.183

Assistant Commissioner for Patents  
Washington, D.C. 20231  
Box DAC

RECEIVED  
JAN 15 2002  
TECH CENTER 1600/2900

Sir:

This is a Petition under 37 C.F.R. §1.182 for matters not otherwise provided for, or in the alternative, under 37 C.F.R. §1.183 for waiver or suspension of rules not otherwise provided for, for the above-identified application. More particularly, applicants petition the Commissioner to accord the subject application a filing date of June 1, 2001. This petition is accompanied by the fee required under 37 C.F.R. §1.17(h).

The subject application was delivered to the Patent and Trademark Office by the "Express Mail Post Office to Addressee" service of the United States Postal Service (USPS) after being deposited in a USPS drop box in the Canandaigua, New York Post Office facility. The application was deposited in the drop box by applicants' undersigned attorney at approximately 11:40 pm on the evening of Friday, June 1, 2001. Since the Canandaigua, New York Post Office facility was closed for the evening, the application was retrieved by the USPS the following morning, and the "Express Mail" mailing label was completed with the "date-in" recorded as June 2, 2001 (the day after the actual deposit in the drop box).

37 C.F.R. §1.10(a) which provides for the filing of correspondence by "Express Mail" indicates that:

(a) Any correspondence received by the Patent and Trademark Office (Office) that was delivered by the "Express Mail Post Office to Addressee" service of the United States Postal Service (USPS) **will** be considered filed in the office **on the date of deposit** with the USPS. The date of deposit with the USPS **is** shown by the "date-in" on the "Express Mail" mailing label...

As indicated above, the "date-in" entered on the "Express Mail" mailing label was not the date of deposit, but the date of retrieval and processing by the USPS. 37 C.F.R. §1.10(d) specifically addresses this issue by allowing an applicant to "petition the Commissioner to accord the correspondence a filing date as of the date the correspondence is shown to have been **deposited** with the USPS", but then goes on to require that the deposit have been made "prior to the last scheduled pickup for that day".

This language would appear to be contradictory to section 1.10(a) which states that correspondence **will** be considered filed **on the date of deposit**. The language regarding "prior to the last scheduled pickup" was added as 37 C.F.R. §1.10(d)(3) by the amendment to 37 C.F.R. §1.10 which was effective December 1, 1997, in response to a comment suggesting that the controlling date for correspondence filed by "Express Mail" be clarified. Although the amendment arguably clarified the controlling date issue, it actually created a contradiction between a controlling date of deposit and a controlling date of retrieval/processing.

It is applicants' contention that use of the date of deposit as the controlling date is in agreement with section 1.10(a) and the intent of the rule. Since it is true that applicants' attorney in the subject application deposited the application with the "Express Mail Post Office to Addressee"

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service on June 1, 2001, and included an Express Mail Certificate which included the label number with the deposited papers, applicants contend that this was the "date of deposit with the USPS". Applicants therefore request that the application be accorded this filing date of June 1, 2001. To determine otherwise would require that the application be accorded the date of processing by the USPS, which would appear to be contrary to the language of section 1.10(a) and the intent of the rule.

For these reasons, applicants and applicants' undersigned attorney petition the Commissioner to accord the subject application the June 1, 2001 filing date.

Respectfully submitted,

December 3, 2001  
Date

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Certificate of Mailing - 37 CFR 1.8(a)	
I hereby certify that this correspondence is being deposited with the United States Postal Service as first class mail in an envelope addressed to: Assistant Commissioner for Patents, Washington, D.C. 20231, on the date below.	
12-3-01	<u>Susan J. Braman</u>
Date	Susan J. Braman Attorney Reg. No. 34,103